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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) **DEFENDANT'S RENEWED**
) **MOTION TO STRIKE CERTAIN**
) **TESTIMONY AND EXHIBITS OF**
) **DAN WINSLOW AND**
) **ADMONISH THE JURY TO**
) **DISREGARD PORTIONS OF HIS**
) **TESTIMONY**

22 Steven DeMocker, by and through counsel, hereby respectfully renews his
23 Motion to strike portions of the testimony of Sergeant Dan Winslow, strike certain
24 exhibits offered during his testimony and admonish the jury to disregard portions of his
25 testimony. This motion is based on the Due Process Clause, the Fifth, Sixth, Eighth and
26 Fourteenth Amendments and Arizona counterparts, Arizona Rules of Evidence, Arizona
27 Rules of Criminal Procedure and the following Memorandum of Points and Authorities.
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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 SEP 13 AM 10:10

JEANNE HICKS, CLERK ✓

BY: B. Chamberlain

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MEMORANDUM OF POINTS AND AUTHORITIES

The defense filed a Motion to Strike the testimony of Winslow on August 2, 2010. The Court denied the Motion with leave to renew after the testimony of relevant expert witnesses. On August 11, 2010 DPS Criminalist John Hoang testified about his examination and comparison of tire track evidence. Based on Mr. Hoang's testimony, the defense hereby renews its Motion to Strike certain testimony and exhibits of Sgt. Winslow.

The admission of testimony and photographs of Sgt. Winslow's attempted experiment of rolling known bike tires near questioned bike tire impressions found at the crime scene was in error for the following reasons: 1) the testimony and exhibits impermissibly invite the jury to perform its own comparison based on unreliable and irrelevant evidence; 2) the testimony and exhibits impermissibly encourage the jury to consider evidence specifically excluded by the Court, namely comparison evidence by lay persons (i.e. the jurors themselves); and 3) the testimony and exhibits impermissibly violate the Sixth Amendment and Due Process by permitting jurors to consider their own comparison. The risk that jurors will perform their own comparison based on this unreliable evidence and consider this comparison in their deliberations violates Mr. DeMocker's right to a fair trial, due process, the confrontation clause and his right to counsel. Mr. Hoang's testimony has further confirmed the unreliability of this evidence and testimony.

I. BACKGROUND

Sgt. Winslow was allowed to display his rolled tire photographs after laboriously describing his examination and photography of the unknown or questioned tire impressions leading from and back to the Glenshandra gate. The defense began litigating the impropriety of this kind of lay testimony in December of 2009 in the Motion in Limine to Preclude Officers as Experts filed on December 18, 2009. At a

1 hearing on the motion, the Court ruled that a *Willits* instruction “would appear
2 appropriate” regarding the shoe print and possibly the bike tire impression evidence
3 based on the State’s failure to properly preserve the evidence.

4 At a hearing on a Motion to Preclude Sgt. Winslow’s testimony on the basis of
5 Rule 702, the Court precluded Winslow, as a non-expert in impression comparison
6 evidence, from testifying about bike track “similarities” or “differences” on April 28,
7 2010.

8 As far as Winslow taking the defendant's bike tire out and being
9 able to roll it and say, I am unable to see differences, that is the
10 same as saying, I am able to see similarities. He is not an expert on
that, and I won't allow that.

11 (April 28, 2010 Transcript 169:3-7.)

12 On July 28, this Court ordered that non-expert witnesses may not testify as to any
13 comparisons and specifically that Sgt. Winslow could not give any testimony comparing
14 impressions evidence of known impressions with impression evidence from the scene.
15 (July 28, 2010 ME).

16 On July 29 and 30, 2010, Sgt. Winslow testified. During his testimony
17 the State offered a number of photographs of tire impressions. Although Sgt.
18 Winslow did not offer any “comparison” testimony, he did describe his
19 experiment for the jury. His experiment consisted of rolling the bike tires of Mr.
20 DeMocker next to bike tire impressions left at the scene and photographing the
21 impressions both with a “measure box” and without. The State introduced
22 photographs of these impressions, often over defense objections.
23

24 **II. Mr. Hoang’s Testimony Confirms that Certain Photographs and**
25 **Testimony Introduced by Sgt. Winslow Are Unreliable and**
26 **Irrelevant**

1 On August 11, 2010, the State's DPS tire impression expert John Hoang
2 testified. Mr. Hoang received 255 images from the State for purposes of his
3 forensic examination. (Bates 311). Of those images, he determined that only 4
4 were suitable for comparison purposes and given the poor quality of those four,
5 determined that a conclusive determination could not be made with respect to the
6 bike tire impressions. Mr. Hoang's limited opinion based on the four
7 photographs is that the bike's tire tread have similar "class characteristics" as the
8 impressions based on the images, but a more conclusive comparison cannot be
9 made.

10 Mr. Hoang testified at trial that casting or examination quality
11 photography could have created additional information for him to analyze in
12 making his comparison. (Transcript of Cross Examination, page 15). He further
13 testified that both of these methods, casting or examination quality photography,
14 were preferable to what YCSO did in this case and that both have taught and
15 recommended by DPS for at least the last ten years. (Page 33). He also
16 explained that YCSO could have contacted DPS either to inquire about the
17 protocols that have been in place for ten years relevant to the preservation of
18 impression evidence or to request that DPS perform the casting or photography
19 in this case. (Page 16-18).

20 Mr. Hoang also testified that the lack of proper scale in YCSO
21 photographs, the fact that the photographs were taken at an angle, and the failure
22 to utilize oblique lighting limited his ability to make any comparison. (Page 20-
23 21). Mr. Hoang was not able to conduct any measurements of the tracks in
24 making his comparison because of the poor quality photographs. (Page 22). He
25 therefore was not able to determine physical size and dimension in his
26 examination. (Page 24). Mr. Hoang's ability as an "expert" to make a
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comparison was compromised because of the way the YSCO took photographs and their failure to make casts. (46-47). He confirmed that he was not able to see enough detail to ever make a potential exclusion. (48-49).

Permitting the jury to consider the testimony about Sgt. Winslow's experiment and photographs encourages the jury to perform a comparison based on evidence the State's own expert deems unreliable. The jury has now been told that Sgt. Winslow rolled Mr. DeMocker's bike tires next to the bike tires at the scene. The jury has also been told that there are photographs in evidence of this experiment.

Based on the arguments submitted in Defendant's Motion to Strike the Testimony of Sgt. Winslow and Mr. Hoang's testimony about the unreliability of these photographs, Sgt. Winslow's testimony and exhibits should therefore be stricken and the jury instructed to disregard them.

CONCLUSION

The Court should strike portions of the testimony of Sgt. Dan Winslow, strike certain exhibits offered during his testimony and admonish the jury to disregard portions of his testimony because: 1) the testimony and exhibits impermissibly invite the jury to perform its own comparison based on unreliable, irrelevant evidence; 2) the testimony and exhibits impermissibly encourage the jury to consider evidence specifically excluded by the Court, comparison evidence by lay witnesses (i.e. the jurors themselves); and 3) the testimony and exhibits impermissibly violate the Sixth Amendment and Due Process by permitting jurors to consider their own comparison, evidence the defense is not able to confront. The risk that jurors will perform their own comparison based on this unreliable evidence and consider this comparison in their deliberations violates Mr. DeMocker's right to a fair trial, due process, and the confrontation clause.

1 DATED this 13th day of September, 2010.

2
3 By: 

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13 **ORIGINAL** of the foregoing hand delivered for
14 filing this 13th day of September, 2010, with:

15 Jeanne Hicks
16 Clerk of the Court
17 Yavapai County Superior Court
18 120 S. Cortez
19 Prescott, AZ 86303

20 **COPIES** of the foregoing hand delivered this
21 13th day of September, 2010, to:

22 The Hon. Warren R. Darrow
23 Judge Pro Tem B
24 120 S. Cortez
25 Prescott, AZ 86303

26 Joseph C. Butner, Esq.
27 Jeffrey Paupore, Esq.
28 Prescott Courthouse basket


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